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14 *Attorneys for Plaintiff Epic Games, Inc.*

15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 **OAKLAND DIVISION**

18 EPIC GAMES, INC.,

19 Plaintiff,

20 vs.

21 APPLE INC.,

22 Defendant.

No. 4:20-CV-05640-YGR

**DECLARATION OF TIMOTHY
SWEENEY IN FURTHER SUPPORT
OF PLAINTIFF EPIC GAMES, INC.'S
MOTION FOR A PRELIMINARY
INJUNCTION**

Date: September 28, 2020 at 9:30 a.m. (via
Zoom Platform)

Courtroom: 1, 4th Floor

Judge: Hon. Yvonne Gonzalez Rogers

1 I, Timothy Sweeney, declare as follows:

2 1. I am the founder and Chief Executive Officer of Epic Games, Inc. (“Epic”), the
3 plaintiff in this action. I submit this declaration in further support of Epic’s Motion for a
4 Preliminary Injunction. (ECF No. 61.) I also submitted a declaration in support of Epic’s Motion
5 for a Preliminary Injunction on September 4, 2020 (ECF No. 65), in which I described Epic’s
6 most popular and successful videogame, *Fortnite*, as well as a separate part of Epic’s business, a
7 software suite available to third-party developers called *Unreal Engine*.

8 2. I have reviewed the submission of Apple Inc. (“Apple”) in opposition to Epic’s
9 Motion for a Preliminary Injunction and noted a number of statements that are factually incorrect.
10 While I will not address all of those statements in responding to Apple’s submission in this
11 declaration, several are discussed below.

12 3. The contents of this declaration are based on my personal knowledge. If called as
13 a witness, I could and would competently testify thereto.

14 **Fortnite and Cross-Platform Play**

15 4. The Declaration of Mike Schmid, dated September 15, 2020 (ECF No. 79) asserts
16 that in September 2018, Epic violated Sony’s rules to force Sony to enable cross-platform play
17 between Sony’s PlayStation 4 and Microsoft’s Xbox One (*id.* ¶ 19). That is false.

18 5. Cross-platform play allows users of different digital platforms to play together in
19 the same online space, among personal computers, dedicated gaming consoles, and mobile
20 devices like smartphones and tablets. Because circles of friends typically include users of
21 different digital platforms, users on all platforms (as well as their videogame developers) benefit
22 greatly from cross-platform features.

23 6. When *Fortnite* was officially released on PlayStation 4 and Xbox One in July
24 2017, users of each of those gaming consoles were unable to play with users of the other console
25 due to restrictions on cross-platform capabilities that were imposed by the console makers.

26 7. In early 2018, Epic approached Sony to advocate for cross-platform play and
27 engaged Sony in business negotiations that spanned several months. On September 18, 2018,
28 Epic and Sony signed an agreement on the launch of a Sony cross-platform beta program that

1 would enable play on *Fortnite* across a variety of platforms, including PlayStation 4, Android,
2 iOS, Nintendo Switch, Xbox One, Microsoft Windows, and macOS operating systems. On
3 September 26, 2018, Sony announced this program publicly, and later that day Epic launched the
4 feature. Contrary to Mr. Schmid's claim that Epic acted "explicitly against PlayStation's rules"
5 (*id.*), Epic did not breach any Sony or PlayStation rules by enabling cross-platform play in
6 September 2018.

7 8. Attached hereto as **Exhibit A** is a true and correct copy of Sony's September 26,
8 2018 announcement of cross-platform features on *Fortnite*.

9 9. Sony's beta program was a success and cross-platform functionality is now fully
10 supported on PlayStation 4 and Xbox One. Many different game publishers now provide cross-
11 platform play for popular multiplayer games, including Activision's *Call of Duty: Warzone*,
12 Microsoft's *Minecraft*, and Electronic Arts' *Need for Speed Heat*.

13 10. Apple's papers also claim that because *Fortnite* is available on multiple platforms,
14 iOS is not an important platform for *Fortnite*. (ECF No. 77, ¶ 27.) That is false. The fact that
15 *Fortnite* can be played on multiple platforms does not mean that Apple's iOS platform is not
16 independently important to *Fortnite*. Each platform is important to *Fortnite* and iOS is
17 particularly important for the reasons discussed herein. Cross-platform functionality is important
18 specifically because it allows *Fortnite* to reach more users and allows users to play and share
19 experiences with other users who have access only to different platforms.

20 11. Mr. Schmid also claims that unnamed "Epic personnel" threatened to "terminate"
21 Epic's relationship with Apple if Apple failed to comply with Epic's routine requests for
22 expedited review or propagation of its apps. (ECF No. 79, ¶ 18.) As discussed in more detail in
23 the Declaration of Andrew Grant dated September 18, 2020, Epic did often make clear to Apple
24 that if Apple's review process extended beyond the launch deadline for a new *Fortnite* build, Epic
25 would launch the new build on other platforms without the iOS platform being updated. Because
26 *Fortnite* at that time required all platforms to run the latest version of the game, this would result
27 in *Fortnite* on iOS being unavailable to users until Apple completed its review of the new build
28 and allowed iOS users to access an updated app. Epic has investigated Mr. Schmid's claim that

1 “Epic personnel have told [him] that if Apple did not comply with its demands, Epic would
2 simply terminate its relationship with Apple and remove its games off of the iOS platform” (*id.*)
3 and found no indication that such a thing was ever said. Epic never issued such a threat and never
4 considered such termination.

5 12. Some of Apple’s assertions related to multi-platform play are contained in the
6 declaration of Lorin Hitt, dated September 15, 2020 (ECF No. 77). Professor Hitt states that
7 because *Fortnite* can be played on multiple platforms, users can “freely” and “seamlessly” switch
8 between the various platforms on which *Fortnite* is available. (*Id.* § 3.1.2.) I do not agree.

9 13. Non-mobile platforms like gaming consoles and PCs are simply not substitutes for
10 mobile device access to *Fortnite*. It does not require an expert to establish that a home-based
11 desktop computer is not a substitute for a personal smartphone in terms of quickly and easily
12 accessing email or using banking software regardless of the user’s location. Similarly, dedicated
13 gaming consoles and PCs are not substitutes for mobile phones for gaming: PCs and gaming
14 consoles are too large to be transported with ease and require a connection to a power supply.
15 Simply put: You cannot carry a PlayStation in your pocket.

16 14. Gaming consoles and many PCs require electrical outlets and connection to
17 dedicated screens. PCs and gaming consoles also require a Wi-Fi or wired Internet connection in
18 order for consumers to play online with others. By contrast, mobile devices are easily portable,
19 battery operated, cellularly connected, and have screens integrated into them. If a consumer is in
20 transit, is away from home, or does not have access to a reliable wired or Wi-Fi Internet
21 connection, playing *Fortnite* on a dedicated gaming console or a PC is not an option. If the
22 consumer wants to play *Fortnite* in those circumstances, he or she will need to play on a mobile
23 device. Moreover, there are typically many more mobile devices per household than computer or
24 gaming consoles. For example, if one family member is playing on PlayStation 4 or watching a
25 show on the television connected to the PlayStation 4, then the others would need to play on their
26 mobile phone.

27 15. I attached to my prior declaration (dated September 4, 2020) examples of
28 consumers who had contacted our customer service group after Apple delisted *Fortnite* from the

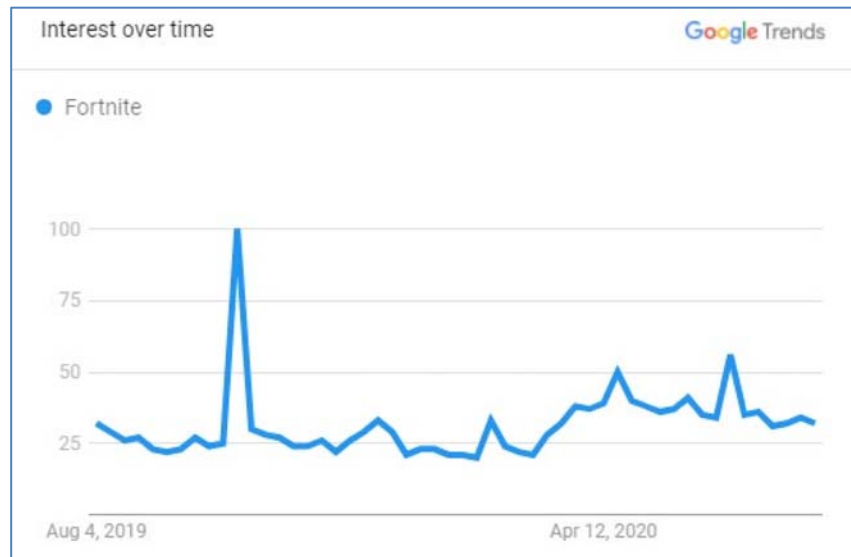
1 App Store, and said that their iPhone or iPad was the only way they had to play the game. (ECF
2 No. 65-5.) Some expressed an inability to afford a second platform. (*Id.*)

3 16. The fact that gaming consoles or PCs are not substitutable for mobile devices is
4 borne out by the data. There are vastly more mobile devices currently in use than there are
5 dedicated gaming consoles. According to publicly reported figures, while there are
6 approximately 1 billion active iPhone users, the total combined number of PlayStation 4, Xbox
7 One, and Nintendo Switch gaming consoles is under 300 million.

8 17. *Fortnite* gaming experiences are also differentiated on dedicated gaming consoles
9 and mobile devices. What dedicated gaming consoles and PCs lack in mobility, they make up for
10 in performance. PCs and consoles typically offer faster processing, larger screens, better
11 graphics, and better controls than mobile devices do. Because of these differences, I would
12 expect players to prefer playing on a console if one is available to them. Yet our data shows that
13 63% of *Fortnite* users on iOS play exclusively on iOS, which suggests that many iOS users do
14 not have access to a gaming console or a PC offering a better experience.

15 **Fortnite's Continued Popularity**

16 18. In its brief, Apple claims that “[b]y July 2020, interest in *Fortnite* had decreased
17 by nearly 70% as compared to October 2019”. (ECF No. 73 at 11.) This is misleading. To
18 support this statistic, Apple cites to Google Trends data, which tracks *not* the number of users
19 actually playing *Fortnite*, but instead the number of daily Google searches for *Fortnite*. In order
20 to come up with a 70% decline, Apple cherry-picked an unusual single-week peak in October
21 2019 with the average number of searches in July 2020, as shown in the chart below:
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Google Trends, <https://trends.google.com/trends/explore?date=2019-08-01%202020-07-31&geo=US&q=Fortnite#TIMESERIES> (last visited Sept. 18, 2020). Apple is aware that the peak in this Google search data corresponds with a two-day in-game *Fortnite* event in October 2019 called “The End”, which amassed record-breaking viewership on Twitter, Twitch, and YouTube as the world of *Fortnite* was swallowed by a black hole.



19. Epic’s actual user engagement data reflecting the actual number of users playing *Fortnite* (not Google search results) shows Apple’s claim of declining interest in *Fortnite* to be incorrect. Over the period of time that Apple cherry-picked for its Google search volume comparison (between October 2019 and July 2020), the number of daily active users on *Fortnite* actually *increased* by more than 39%.

1 **Apple's Marketing of the DJ Marshmello Event**

2 20. Mr. Schmid's declaration states that Apple "placed billboards in New York's
3 Times Square and LA Live to promote an in-app *Fortnite* concert with DJ Marshmello". (ECF
4 No. 79 ¶ 11.) This statement is inaccurate.

5 21. The billboards actually promoted Apple's own Apple Music app and service,
6 which offered a playlist containing music that DJ Marshmello had performed in a *Fortnite*
7 concert.

8 22. An image of Apple's billboard in Times Square that DJ Marshmello posted on
9 Twitter following the concert is attached as **Exhibit B**.

10 **Purchases Within *Fortnite* and Epic Games Stores**

11 23. Apple claims that its in-app purchase requirements are "hardly unique" and states
12 that "Epic's own app marketplace charges users and developers a commission". (ECF No. 73 at 6
13 & n.7.) This is inaccurate because it mixes store sales and in-game purchases.

14 24. The Epic website cited by Apple describes *software sales*, not in-game purchases.
15 As stated in my declaration of September 4, 2020 (ECF No. 65), Epic provides developers who
16 distribute their software through the Epic Games Store (including free games distributed at no
17 charge) the freedom to choose their in-game purchase payment processor without any payment to
18 Epic. (*Id.* ¶ 10.)

19 **Unreal Engine**

20 25. The dispute between Epic and Apple concerns the distribution and payment
21 options for and in *Fortnite*, an entirely different product from *Unreal Engine* or Epic's other non-
22 game products.

23 26. Apple has asserted that Epic might use *Unreal Engine* as a vehicle for the insertion
24 of malware or other code intended to breach contractual obligations with Apple. (ECF No. 73
25 at 28.) But as described in more detail in my prior declaration (ECF No. 65) and in the
26 Declaration of Nicholas Penwarden, dated September 4, 2020 (ECF No. 64) (the "Penwarden
27 Declaration"), *Unreal Engine* is not an iOS app. It is a development tool that has been used to
28 create software and content on multiple platforms, including Apple iOS, for over ten years.

1 *Unreal Engine* is licensed and trusted as a software foundation by companies including
2 Microsoft, Sony, Nintendo, Electronic Arts and Activision. Neither *Unreal Engine* nor any other
3 Epic product was ever used by Epic as a vehicle to insert malware or other malicious code onto
4 any platform. Epic never has and never will intentionally insert malware or other malicious code
5 onto any platform.

6 27. Epic has taken issue with a particular set of payment processing rules that it
7 believes are illegal and unenforceable. Epic will continue to comply with all contractual
8 obligations with Apple relating to its non-game products and services, including *Unreal Engine*,
9 during the pendency of this lawsuit.

10 **Competition to Unreal Engine**

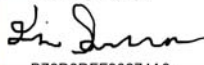
11 28. Apple also suggests that *Unreal Engine* is easily replaceable with *Unity*, another
12 development platform. This argument is incorrect.

13 29. As described in more detail in the Penwarden Declaration, *Unreal Engine*
14 developers have invested significant time and resources into projects reliant on *Unreal Engine*,
15 and moving away from it would thus cause them significant harm. (ECF No. 64, ¶ 10.)

16 30. In addition, *Unity* is the only major competitive licensable alternative to *Unreal*
17 *Engine*. As a result, eliminating *Unreal Engine* would mean that developers would have
18 significantly less choice than before, and competition would be harmed. Therefore, if Apple is
19 allowed to prevent iOS development on *Unreal Engine*, all developers would suffer.

20
21 Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true
22 and correct and that I executed this declaration on September 18, 2020, in Cary, North Carolina.

23 DocuSigned by:

24 

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26 Timothy Sweeney